Kelaye Concrete LLC *and* Operative Plasterers' and Cement Masons' Union, Local 528, affiliated with Operative Plasterers' and Cement Masons' Inter National Association, AFL–CIO. Cases 19–CA–168201, 19–CA–171176, and 19–CA–171823

September 19, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

The General Counsel seeks a default judgment in this case on the ground that the Respondent failed to file an answer to the consolidated complaint. Upon charges and an amended charge filed by Operative Plasterers' and Cement Masons' Union, Local 528, affiliated with Operative Plasterers' and Cement Masons' International Association, AFL–CIO (the Union) on various dates between January 15 and March 14 2016, the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing on May 31, 2016, against Kelaye Concrete LLC (the Respondent), alleging that it has violated Section 8(a)(1), (3), and (5), within the meaning of Section 8 (d) of the Act. The Respondent failed to file an answer.

On July 1, 2016, the General Counsel filed with the National Labor Relations Board a Motion to Transfer Case to the Board for Default Judgment. Thereafter, on July 7, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 19, 2016, the General Counsel submitted a statement in further support of the motion. The Respondent filed no response. The allegations in the motion are therefore undisputed.

On the entire record, the National Labor Relations Board makes the following

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively stated that unless an answer was received by June 14, 2016, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter and email dated June 17, 2016, advised the Respondent that unless an answer was received by June 24, 2016, a motion for default judgment would be filed. Nevertheless, the Respondent failed to file an answer.

In the absence of good cause being shown for the failure to file an answer, we deem the allegations of the consolidated complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a State of Oregon limited liability corporation with operations in the State of Washington, has been engaged in the construction business.

During the 12 months preceding issuance of the complaint, the Respondent received gross revenues valued in excess of $500,000, and purchased and received goods within the State of Washington valued in excess of $50,000 directly from suppliers outside of the State of Washington.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Rebecca Williams	Owner
Russ Williams	Owner's husband
Katie Conrad	Bookkeeper/office manager
Jason Krause	Supervisor
Shawn Roberts	Supervisor

The following employees of the Respondent (the unit) constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All cement masons' work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work in the following counties in the State of Washington: Clalum, Cowlitz, Grays Harbor, Island, Jefferson, King, Kitsap, Lewis, Mason, Pacific, San Juan, Skagit, Snohomish, Thurston, and Whatcom.

About May 15, 2015, the Respondent, an employer engaged in the building and construction industry, entered into a compliance agreement whereby it agreed to be bound by the collective-bargaining agreement between the Union and individual members of the Associated General Contractors of Washington effective from June 1, 2015 to May 31, 2018, and agreed to be bound to future agreements unless timely notice was given. By entering into the agreement described above, the Respondent recognized the Union as the exclusive collective-bargaining representative of the unit without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act.[1]

The following events occurred, giving rise to these proceedings.

1. In about mid-December 2015, the Respondent, by Rebecca Williams, by telephone:

(a) threatened its employees that they would not be rehired if they were

Union; and

(b) threatened its employees that the Respondent was seeking to go nonunion.

2. About December 11, 2015, the Respondent, by Russ Williams, by telephone:

(a) interrogated its employees about their Union activities; and

(b) prohibited its employees from talking about the Union or benefits during work.

3. About January 14, 2016, the Respondent, by Rebecca Williams, by telephone, interrogated employees about their union status and/or support.

4. About January 15, 2016, the Respondent, by Katie Conrad, by telephone, interrogated employees about their union status and/or support.

5. About December 11, 2015, the Respondent discharged and/or constructively discharged its employees Dan Ellis, Geoff Hagedorn, Riley Kerle, and Wade Kerle.

6. About January 18, 2016, the Respondent discharged its employee Mikal Davenport.

7. The Respondent engaged in the conduct described above in paragraphs 5 and 6 because Ellis, Hagedorn, Riley Kerle, Wade Kerle, and Davenport joined and/or supported the Union and engaged in concerted activities, or were perceived by the Respondent as doing so, and to discourage employees from engaging in these or other protected, concerted activities.

8. Since about September 4, 2015, the Respondent failed to pay employee benefits.

9. Since about September 4, 2015, the Respondent failed to continue in effect all the terms and conditions of the collective-bargaining agreement described above by failing to pay employee benefits.

10. The subjects set forth above in paragraphs 8 and 9 relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

11. The Respondent engaged in the conduct described above in paragraphs 8 and 9 without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

12. Respondent engaged in the conduct described above in paragraph 9 without the Union's consent.

13. As a result of the Respondent's conduct described above in paragraphs 8 through 12, in about December 2015, the Respondent constructively discharged its employee Jose Mendoza.

14. As a result of the Respondent's conduct described above in paragraphs 8 through 12, in about late February 2016, the Respondent constructively discharged its employee Brandon Martinson.

15. The Respondent engaged in the conduct described above in paragraphs 8 and 9 because its employees joined and/or supported the Union and engaged in concerted activities, or were perceived by the Respondent as doing so, and to discourage employees from engaging in these or other protected, concerted activities.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraphs 1 through 4, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

2. By the conduct described above in paragraphs 5 through 9 and 11 through 15, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

[1] The complaint alleges that the Respondent is a construction industry employer and that it granted recognition to the Union without regard to whether the Union had established majority status. Accordingly, we find that the relationship was entered into pursuant to Sec. 8(f) of the Act and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See, e.g., *A.S.B. Cloture, Ltd.*, 313 NLRB 1012, 1012 fn. 2 (1994), citing *Electri-Tech, Inc*., 306 NLRB 707, 707 fn. 2 (1992), and *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F. 2d 770 (3d Cir. 1988).

3. By the conduct described above in paragraphs 8 through 9 and 11 through 14, the Respondent has been failing and refusing to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.

4. The Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by discharging and/or constructively discharging employees Dan Ellis, Geoff Hagedorn, Riley Kerle, Wade Kerle, Mikal Davenport, Jose Mendoza, and Brandon Martinson, we shall order the Respondent to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order the Respondent to compensate Ellis, Hagedorn, Riley Kerle, Wade Kerle, Davenport, Mendoza, and Martinson for any adverse tax consequences of receiving lump-sum backpay awards, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate Ellis, Hagedorn, Riley Kerle, Wade Kerle, Davenport, Mendoza, and Martinson for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[2]

Further, the Respondent shall be required to remove from its files any and all references to the unlawful discharges and/or constructive discharges of these employees, and to notify them in writing that this has been done and that the discharges and/or constructive discharges will not be used against them in any way.

Having found that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by failing to continue in effect all of the terms and conditions of the collective-bargaining agreement described above by failing to pay employee benefits, we shall order the Respondent to honor and abide by the terms of the agreement, and any automatic extension or renewal thereof, and to make the unit employees whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Kelaye Concrete LLC, Boring, Oregon, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening employees that they would not be rehired if they were Union supporters and/or members.

(b) Threatening employees by stating that it was seeking to go nonunion.

(c) Coercively interrogating employees about their union membership, activities, sympathies, and/or support.

(d) Prohibiting employees from talking about the Union or benefits during work.

(e) Discharging or constructively discharging employees because they engaged in, or are perceived to have engaged in, union and other protected concerted activities, and to discourage employees from engaging in such activities.

(f) Failing and refusing to bargain collectively and in good faith with Operative Plasterers' and Cement Masons' Union, Local 528, affiliated with Operative Plasterers' and Cement Masons' International Association, AFL–CIO as the limited exclusive collective-bargaining representative of the employees in the following unit, by failing to continue in effect all the terms and conditions

[2] For the reasons stated in his separate opinion in *King Soopers*, 364 NLRB No. 93, slip op. at 9–16, Member Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

of employment provided for in the June 1, 2015— May 31, 2018 collective-bargaining agreement between the Union and individual members of the Associated General Contractors of Washington, and any automatic renewal or extension of it, by failing to pay employee benefits. The unit is:

> All cement masons' work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work in the following counties in the State of Washington: Clalum, Cowlitz, Grays Harbor, Island, Jefferson, King, Kitsap, Lewis, Mason, Pacific, San Juan, Skagit, Snohomish, Thurston, and Whatcom.

(g) Failing to continue in effect all the terms and conditions of employment provided for in the collective-bargaining agreement described above by failing to pay employee benefits because its employees supported the Union and/or engaged in other protected concerted activities, or were perceived by the Respondent as doing so, and to discourage employees from engaging in such activities.

(h) Constructively discharging employees because of its failure to continue in effect all the terms and conditions of employment provided for in the collective-bargaining agreement described above by failing to pay employee benefits.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employees Dan Ellis, Geoff Hagedorn, Riley Kerle, Wade Kerle, Mikal Davenport, Jose Mendoza, and Brandon Martinson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make employees Dan Ellis, Geoff Hagedorn, Riley Kerle, Wade Kerle, Mikal Davenport, Jose Mendoza, and Brandon Martinson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from their files any reference to the unlawful discharges and/or constructive discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges and/or constructive discharges will not be used against them in any way.

(d) On request, bargain with the Union as the limited exclusive collective-bargaining representative of the unit.

(e) Honor and comply with the terms of the June 1, 2015—May 31, 2018 collective-bargaining agreement between the Union and individual members of the Associated General Contractors of Washington and any automatic renewal or extension of it, including by paying employee benefits.

(f) Make employees whole for any loss of earnings and other benefits suffered as a result of its failure to pay employee benefits since September 4, 2015, with interest, in the manner set forth in the remedy section of this decision.

(g) Compensate Dan Ellis, Geoff Hagedorn, Riley Kerle, Wade Kerle, Mikal Davenport, Jose Mendoza, Brandon Martinson, and any affected unit employees who receive backpay as a result of the Respondent's unlawful changes in terms and conditions of employment, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Washington facilities copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2014.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 19, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that you will not be rehired if you were Union supporters and/or members.

WE WILL NOT threaten you by stating that we are seeking to go nonunion.

WE WILL NOT coercively interrogate you about your union membership, activities, sympathies, and/or support.

WE WILL NOT prohibit you from talking about the Union or benefits during work.

WE WILL NOT discharge or constructively discharge you because you have engaged in, or are perceived to have engaged in, union and other protected concerted activities, and to discourage employees from engaging in such activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Operative Plasterers' and Cement Masons' Union, Local 528, affiliated with Operative Plasterers' and Cement Masons' International Association, AFL–CIO as the limited exclusive collective-bargaining representative of our employees in the following unit by failing to continue in effect all the terms and conditions of employment in the June 1, 2015—May 31, 2018 collective-bargaining agreement, and any automatic renewal or extension of it, by failing to pay employee benefits. The unit is:

> All cement masons' work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work in the following counties in the State of Washington: Clalum, Cowlitz, Grays Harbor, Island, Jefferson, King, Kitsap, Lewis, Mason, Pacific, San Juan, Skagit, Snohomish, Thurston, and Whatcom.

WE WILL NOT fail to continue in effect all the terms and conditions of employment in the June 1, 2015—May 31, 2018 collective-bargaining agreement by failing to pay employee benefits to the unit employees described above because our employees supported the Union and/or engaged in other protected concerted activities, or were perceived by us as doing so, and to discourage employees from engaging in such activities.

WE WILL NOT constructively discharge any of you because of our failure to continue in effect all the terms and conditions of employment provided for in the June 1, 2015—May 31, 2018 collective-bargaining agreement by failing to pay employee benefits.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer employees Dan Ellis, Geoff Hagedorn, Riley Kerle, Wade Kerle, Mikal Davenport, Jose Mendoza, and Brandon Martinson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees Dan Ellis, Geoff Hagedorn, Riley Kerle, Wade Kerle, Mikal Davenport, Jose Mendoza, and Brandon Martinson whole for any loss of earnings and other benefits suffered as a result of the discrim-

ination against them, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and/or constructive discharges, and WE WILL, within 3 days thereafter, notify each employee in writing that this has been done and that the discharges and/or constructive discharges will not be used against them in any way.

WE WILL, on request, bargain with the Union as the limited exclusive collective-bargaining representative of the unit.

WE WILL honor and comply with the terms of the June 1, 2015—May 31, 2018 collective-bargaining agreement between the Union and individual members of the Associated General Contractors of Washington and any automatic renewal or extension of it.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of our failure to pay employee benefits since September 4, 2015, with interest.

WE WILL compensate Dan Ellis, Geoff Hagedorn, Riley Kerle, Wade Kerle, Mikal Davenport, Jose Mendoza, Brandon Martinson, and any affected unit employees who receives backpay as a result of our unlawful changes in terms and conditions of employment, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 19, within 21 days from the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

KELAYE CONCRETE LLC

The Board's decision can be found at www.nlrb.gov/case/19–CA–168201 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.